United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1367

ORIGINAL

1237

In the

United States Court of Appeals

For the Second Circuit.

FRANCIS J. LANGFORD, individually and as natural guardian of FRANK P. LANGFORD, an infant,

Plaintiff-Appellee,

against

CHRYSLER MOTORS CORP.,

Defendant-Appellant,

and

WOODBRIDGE DODGE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANT-APPELLEE.

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In The

United States Court of Appeals

For The Second Circuit.

Francis J. Langford, individually and as natural guardian of Frank P. Langford, an infant,

Plaintiff-Appellee,

against

Chrysler Motors Corp.,

Defendant-Appellant,

and

Woodbridge Dodge, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF OF DEFENDANT-APPELLEE.

Issues Presented.

Defendant-Appellee, Woodbridge Dodge, Inc., will confine its argument to Point VI of defendant-appellant's brief, asserting that it is entitled to indemnity on its cross-claim, as stated in #6 of the issues presented for this Court's consideration.

Facts.

From the time plaintiff purchased the vehicle in July of 1971 (18a) until December of 1971, the car had traveled

about four thousand miles (18a) and was in good operating condition (18a) and he never had trouble at all steering the car, even at speeds of 70 miles an hour (30a) or driving it up and down mountains or unlevel terrain (31a), nor had his wife ever experienced any difficulty with the steering (31a), nor on the date of the accident, while traveling at sixty miles an hour, did he find anything unusual with the operation of the steering wheels (35a).

Testimony of the service manager of defendant-appellee at an examination before trial was read into the record. He testified that on December 2, 1971, the day before the accident, the plaintiff brought his car into Woodbridge Dodge, Inc. (18a), for the 4,000-mile checkup, but did not make any complaints about the steering (165a). As part of the checkup or inspection, the car is placed on a lift and nothing was found to be wrong (165a). As far as the interior composition of the ball joint, he could only see the threads where the nut attaches on the top of it (167a).

POINT I.

The Court was correct in allowing defendant-appellee full indemnification over and against defendant-appellant and dismissing the cross-claim of defendant-appellant.

In his decision, Judge Costantino stated as follows:

> "The ball joint, manufactured and designed by Chrysler was not susceptible to interference by the dealer. * * * and in light of the *latent character of the defect* * * *" (174a). (Italics supplied.)
>
> "In the case at bar, the primary responsibility for the defective ball joint lies with Chrysler.

Woodbridge's degree of fault was minimal in that it could not have discovered the defect and did nothing to create it" (175a). (Italics supplied.)

It is significant to note that plaintiff's complaint is grounded solely on breach of warranty, and that no cause of action is asserted for negligence (4a-6a).

That the only allegation in plaintiff's complaint as to the cause of the accident is contained in paragraph 9 (5a) which states: "That such collision was caused by *a defective right ball joint which was improperly designed or assembled* (italics supplied), resulting in a seizure or disengagement of the ball stud from the socket resulting in the loss of steering control alleged."

This is the theory adopted by the plaintiff to establish his case for breach of warranty against both defendants and the theory adopted by plaintiff's expert witness Vasilis Morfopoulos (130a, 154a).

His testimony to substantiate this claim of a defective right ball joint was based solely on a microscopic and metalgraphic and metallurgical examination of the assembly (127a, 128a, 129a).

He stated that in coming to his conclusion that he "relied upon the condition of the socket. The condition of the stud bearing, the upper bearing" (131a), *all* of which conditions were found not by visual inspection but by miscroscopic examination (127a-130a).

It is apparent that the alleged defective ball stud is completely contained or enclosed in the socket (52a, 84a).

The car having been tested for proper assembly before it was sent to the dealer (99a), the dealer would not be

able to determine the hardness of the material (155a) and therefore would not be responsible for any latent defects therein.

In the case of *Kelly v. Long Island Lighting Co.*, 31 N. Y. 2d 25, 286 N. E. 241, 334 N. Y. S. 2d 851, cited by appellant, the jury had returned a verdict in favor of the plaintiffs against both defendants. The Trial Judge, in turn, dismissed the cross-claims of the defendants on the ground that each party was guilty of "active" negligence, and, therefore, not entitled to a recovery over from the other. The Court of Appeals held that this was error under the decision in *Dole v. Dow Chem. Co.*, 30 N. Y. 2d 143, 331 N. Y. S. 2d 382, 282 N. E. 2d 288, and remanded the case to the Trial Court to fix the relative degrees of negligence and determine the percentage of fault attributable to each of the defendants.

In the case at bar the Court below correctly found from the evidence that "Woodbridge's degree of fault was minimal" and permitted full indemnification over and against defendant-appellant.

In the case of *Fass v. City of New York*, 40 A. D. 2d 772, 337 N. Y. S. 2d 545, cited by appellant, the Appellate Division reinstated a cross-complaint where the Trial Court had dismissed the same before the *Dole v. Dow* decision, because the Appellate Division found "*upon the record*" that apportionment was appropriate and concluded "*that on the evidence*, the damages to be assessed against defendants should be apportioned equally." (Italics supplied.)

In the case at bar, the Court below found to the contrary.

The case of *Stein v. Whitehead*, 40 A. D. 2d 89, 337 N. Y. S. 2d 821, cited by appellant, involved a three-car collision and suit was instituted by the owner and driver of one car against the other two motorists, who had collided at an intersection. The jury found for plaintiffs against both defendants, but the Trial Court set aside the verdict as against one of the defendants and dismissed the complaint as to him. The defendant, against whom the verdict was permitted to stand, appealed.

The Appellate Division held that the Trial Court erred when it dismissed the complaint, on the ground that the jury, *from the facts*, had the right to find him guilty of negligence.

In the case at bar, the Court below, as aforesaid, found the primary responsibility for the defective ball joint lies with appellant and that "Woodbridge's degree of fault was minimal" (175a).

The remaining cases cited by appellant merely enunciate the general principles outlined under the *Dole* doctrine, doing away with the "active-passive" test and, instead, apportioning liability according to the relative degrees of culpability. Appellee has no fault to find with these principles, nor does appellee dispute that a defendant may assert a cross-claim for indemnity and/or contribution against a co-defendant.

However, to baldly allege that Chrysler is entitled to indemnity from appellee Woodbridge because Woodbridge "was in a superior position to find the alleged defect and remedy it than the defendant, Chrysler Motors Corp.," is completely erroneous and fallacious and is utterly without any merit or basis in fact.

A careful reading of the testimony of the experts will disclose that the defect, if any, was latent and could only have been discovered by microscopic, metalgraphic or metallurgical examination (127a, 128a, 129a). Such defect could not possibly be found by the 4,000-mile check-up.

In the case of *Schwartz v. Macrose Lumber & Trim Co.*, 50 Misc. 2d 547, 270 N. Y. S. 2d 875, 50 Misc. 2d 1055, 272 N. Y. S. 2d 227, the Court stated:

> "The traditional rule is that a retailer is liable in negligence for failure to discover defects which may be found by inspection alone as opposed to dangers so concealed that mechanical tests are needed to disclose them" (citing cases).

In the case at bar, the Trial Court, being the trier of the facts, after hearing all of the evidence, allowed appellee Woodbridge full indemnification over and against appellant Chrysler and dismissed Chrysler's cross-claim against Woodbridge.

As was enunciated in *Dole, supra* (at p. 391), "Right to apportionment of liability or to *full indemnity*, then, as among parties involved together in causing damage by negligence, should *rest on relative responsibility and to be determined on the facts.*" (Italics supplied.)

In the case of *Kelly v. Diesel Construction*, 70 Misc. 2d 686, 334 N. Y. S. 2d 309, aff'd 42 A. D. 2d 891, 347 N. Y. S. 2d 698, the Court stated that the rule established in *Dole, supra*, permits "indemnity where a party was less culpable than the principal wrongdoer, although both are equally liable to the person injured (42 C. J. S., Indemnity, Sec. 27, subd. b, p. 606, and cases assembled under n. 30)." The Court further stated that "the trier of the

facts must now determine the difference in the degree of wrong committed and apportion responsibility among the joint tortfeasors accordingly." In this case the Court awarded full indemnity to one defendant against the other.

Rule 52(a) of the Rules of Civil Procedure provides that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In discussing Rule 52(a) in the 1971 edition of Wright and Miller "Federal Practice and Procedure," it is stated on page 729 that under this rule the findings of the Court below, sitting without a jury, are presumptively correct. The burden is on the appellant to persuade the reviewing Court that a finding was clearly erroneous. In the colorful phrase of one Court, the findings "come here well armed with the buckler and shield of Rule 52(a)." See annotations under notes 90 and 91 on page 729. On page 732, it is stated:

> "The appellate court, in reviewing findings, does not consider and weigh the evidence *de novo*. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law."

Conclusion.

The Court's decision and judgment with respect to defendant-appellee, Woodbridge, and defendant-appellant, Chrysler, should be affirmed.

Respectfully submitted,

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